

IN THE MATTER OF DEBORAH ANN McKAY, solicitor

- AND -

IN THE MATTER OF THE SOLICITORS ACT 1974

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Mr S N Jones (in the chair)  
Mr P Haworth  
Mrs S Gordon

Date of Hearing: 9th October 2003

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## **FINDINGS**

of the Solicitors Disciplinary Tribunal  
Constituted under the Solicitors Act 1974

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An application was duly made on behalf of the Office for the Supervision of Solicitors (the "OSS") by Jonathan Richard Goodwin solicitor and partner in the firm of JST Mackintosh of Colonial Chambers, Temple Street, Liverpool (now of Jonathan Goodwin, Solicitor Advocate, 17e Telford Court, Dunkirk Lee, Chester Gates, Chester CH1 6LT) on 10<sup>th</sup> February 2003 that Deborah Ann McKay of Candle Street, Rieking, Suffolk, might be required to answer the allegations contained in the statement which accompanied the application and that such order might be made as the Tribunal should think right.

The allegations against the Respondent were that she had been guilty of conduct unbecoming a solicitor in each of the following particulars namely:-

- (i) That contrary to Rule 8 of the Solicitors Accounts Rules 1991 she drew money out of client account other than as permitted by Rule 7 of the said Rules and/or in the alternative contrary to Rule 22 of the Solicitors Accounts Rules 1998.
- (ii) That contrary to Rule 21 (2) (a) of the Solicitors Accounts Rules 1998 the Respondent incorrectly lodged and retained funds properly belonging to the Legal Services Commission in Office account.

- (iii) Contrary to Rule 21 (2) (b) of the Solicitors Accounts Rules 1998 the Respondent failed to retain funds properly due to the Legal Services Commission in client account.
- (iv) That she utilised monies properly belonging to the Legal Services Commission for her own purpose.
- (v) That she utilised clients funds for her own purpose.
- (vi) That she failed to exercise adequate or any supervision of staff.
- (vii) That she failed to submit and/or ensure that claim forms were provided to the Legal Services Commission forthwith upon the completion of a litigated matter, contrary to Rule 72 of the Civil Legal Aid (General) Regulations 1989.

The application was heard at the Court Room, 3<sup>rd</sup> Floor, Gate House, 1 Farringdon Street, London, EC4M 7NS on 9<sup>th</sup> October 2003 when Jonathan Richard Goodwin Solicitor Advocate of 17e Telford Court, Dunkirk Lee, Chester Gates, Chester CH1 6LT appeared as the Applicant and the Respondent was represented by Mr Smith of Counsel.

The evidence before the Tribunal included the admissions of the Respondent and the oral evidence of Mr Matthew Beer.

**At the conclusion of the hearing the Tribunal made the following order:-**

The Tribunal order that the Respondent, Deborah Ann McKay of Candle Street, Rieking, Suffolk, solicitor, be suspended from practice as a solicitor for an indefinite period to commence on the 9<sup>th</sup> day of October 2003 and they further order that she do pay the costs of and incidental to the application and enquiry fixed in the sum of £8,000.00.

**The facts are set out in paragraphs 1 to 33 hereunder:-**

1. The Respondent born in 1964 was admitted as a solicitor in 1989 and her name remained on the Roll of Solicitors.
2. At all material times the Respondent carried on practice on her own account under the style of McKay Beer from offices at 122a Gloucester Avenue, London, NW1 8HX. On the 22<sup>nd</sup> May 2002 the Adjudication Panel, having considered the Forensic Investigation ('FIU') Unit Report dated 18<sup>th</sup> May 2001 resolved to intervene into the Respondent's practice.
3. The FIU carried out an inspection of the Respondent's books of account commencing 21<sup>st</sup> March 2001. A copy of the FIU Report dated 18<sup>th</sup> May 2001 which was before the Tribunal showed the Respondent's books of account did not comply with the Solicitors Accounts Rules and that there was a shortage in clients funds of £94,124.39.

4. The shortage was reduced on the 1<sup>st</sup> and 5<sup>th</sup> March 2001 by office to client account transfers totalling £1,614.54, thereby eliminating the debit balances which existed. On 9<sup>th</sup> March 2001 the cash shortage was further reduced by £350.00 by a recoupment made by the Legal Services Commission. On 21<sup>st</sup> March 2001 a further office to client bank account transfer, in the sum of £7,815.07, dealt with the unallocated transfers and personal payment which had been debited to the suspense account. The total cash shortage identified by the Investigation & Compliance Officer as having been replaced totalled £9,779.61, with the result that the remaining cash shortage was in the sum of £84,344.78.

5. Paragraph 11 of the FIU Report identified the cause of the cash shortage as follows:-

(a)	Legal Services Commission funds incorrectly retained in office bank account in respect of 3 client matters –	£79,552.49
(b)	Unpaid Counsel's fees	£4,623.63
(c)	Unallocated transfers from client to office bank account	£4,565.07
(d)	Personal payment from client bank account	£3,250.00
(e)	Debit balances –	£1,614.54
(f)	Book difference (shortage)	£ 518.66
	Total	£94,124.39

6. The Respondent agreed the existence of the cash shortage of £94,124.39 on client bank account as at 28<sup>th</sup> February 2001.

**Legal Services Commission Funds incorrectly retained in office bank account - £79,552.49 made up as follows:-**

**Mr S - £34,194.62**

7. The Respondent's firm acted for Mr S in a legally aided medical negligence litigation matter. The fee earner was a Mr C. The Defendant was represented by Hempsons Solicitors in London. The Respondent had previously had conduct of the matter whilst she had been a partner in the firm of Ellis & Fairbairn. On the 11<sup>th</sup> September 2000 Mr C submitted a 'CLAIM2' form to the Legal Services Commission indicating there would be no claim on the fund as the costs had been met by the other side.

8. Hempsons had paid the Respondent's firm monies on account of costs and disbursements, as follows:-

28 <sup>th</sup> January 1999	£32,000.00 (paid into client account)
24 <sup>th</sup> February 2000	£13,000.00 (paid into office bank account)
6 <sup>th</sup> April 2000	£1,021.72 (paid into office bank account)

The payments on the 24<sup>th</sup> February 2000 and 6<sup>th</sup> April 2000 were in breach of the Solicitors Accounts Rules as the monies should properly have been paid into client account.

9. Paragraph 15 of the FIU Report identified client to office bank account transfers made out of the £32,000.00 received from the Defendant's Solicitors as follows:-

11 <sup>th</sup> February 1999	£13,827.18
2 <sup>nd</sup> February 1999	£5,000.00
14 <sup>th</sup> April 1999	£10,000.00
28 <sup>th</sup> May 1999	£ 3,000.00

10. The total amount of monies transferred from client to office bank account in the sum of £31,827.18 was in breach of the Solicitors Accounts Rules as the funds were needed to cover the Legal Services Commission clawback. The Respondent agreed that during the period February 1999 – May 1999, when the above transfers were effected, the clawback due to the Legal Services Commission would have been at least £35,000.00. The Respondent could not explain why sufficient funds had not been retained or lodged in client bank account to cover the recoupment due to the Legal Services Commission. The Respondent agreed that as at 28<sup>th</sup> February 2001 the Legal Services Commission had recouped the total of £2,875.17 by way of set off against sums due to the firm in respect of costs in connection with other legally aided clients, with the result that an amount of £34,194.62 was outstanding as at the inspection date.
11. The Respondent further agreed that because no funds stood to the credit of Mr S's account in the client's ledger, there was a cash shortage on client bank account of £34,194.62 in respect of the unrecouped sum due to the Legal Services Commission. Taking into account a further recoupment by the Legal Services Commission on 9<sup>th</sup> March 2001, an amount of £33,844.62 was outstanding.

**Mr M - £26,278.00 (Legal Services Commission Funds incorrectly retained in Office bank account – £21,654.37 and unpaid Counsel's fees of £4,623.63**

12. The Respondent's firm acted for Mr M in a legally aided litigation matter with the fee earner being Mr C. The Defendant was represented by Pinsent Curtis Solicitors of London.
13. On the 21<sup>st</sup> December 1998 the sum of £25,750.00 was received from the Defendant's solicitor on account of costs and disbursements and was lodged in client bank account. On 21<sup>st</sup> December 1998 and 6<sup>th</sup> January 1999, amounts of £15,000.00 and £10,000.00 respectively, were transferred from client to office bank account in breach of the Solicitors Accounts Rules.

14. On the 16<sup>th</sup> September 1999 a further sum of £4,000.00 was received from the Defendant's solicitors on account of costs and disbursements and was lodged in office bank account.
15. The Respondent agreed that during the period December 1998 - January 1999, when the above transfers were effected, the clawback due to the Legal Services Commission was in the sum of £21,654.37. Further amounts totalling £4,623.63 were received due to Counsel, which were retained in office bank account with Counsel remaining unpaid.
16. The Respondent confirmed that the 'CLAIM2' form had not been submitted to the Legal Services Commission. The Respondent was unable to explain why the client to office bank account transfers totalling £25,000.00 were effected and why the sum of £4,000.00 was lodged in office bank account in September 1999 having regard to the fact that the matter was a legally aided case.
17. The Respondent agreed that because no funds stood to the credit of Mr M's account in the client's ledger, there was a cash shortage on client bank account in the sum of £21,654.37 in respect of the unrecouped sum due to the Legal Services Commission and in addition a cash shortage in the sum of £4,623.63 in respect of unpaid Counsel's fees.

**Mr E - £23,703.50**

18. The firm acted for Mr M in a legally aided personal injury matter. The fee earner was Mr C. The Defendant was represented by Vizards Solicitors of London.
19. The Investigation & Compliance Officer discovered hand written attendance notes in the client matter file which he assumed were prepared during September 1998 having regard to their location in a clip of correspondence. The notes included a calculation which made reference to the "LAB clawback" in the region of £26,000.00. The Respondent confirmed that Mr C had prepared the attendance notes and agreed that they showed that he had been aware of a clawback of costs and disbursements due to the Legal Services Commission of at least £23,703.50.
20. On the 27<sup>th</sup> August 1998 the sum of £25,000.00 was lodged in client bank account. The Respondent agreed that these funds were from the Defendant's Solicitors on account of the firms' costs and disbursements. On 5<sup>th</sup> October 1998 and 8<sup>th</sup> December 1998, amounts of £11,750.00 and £11,875.00, totalling £23,625.00 were transferred from client to office bank account from the monies received from the Defendant's solicitors in breach of the Solicitors Accounts Rules.
21. On 21<sup>st</sup> January 1999 a further sum of £25,153.79 was paid to the firm on account of costs and disbursements and was lodged in client bank account. The balance remaining on Mr E's account after payment of Counsel and experts' fees was in the sum of £18,803.47. That remained the position until the 15<sup>th</sup> September 2000 when the sum of £18,000.00 was transferred from client to office bank account and a further sum of £803.47.00 was transferred on the 29<sup>th</sup> September 2000 reducing the client ledger to nil, such transfers being in breach of the Solicitors Accounts Rules.

22. The Respondent was unable to explain why the transfers had been made particularly having regard to the fact that Mr C had been aware of the Legal Services Commission clawback. The Respondent confirmed that she would have authorised the bank transfers, although Mr C would have instigated them. No 'CLAIM2' form had been submitted to the Legal Services Commission.
23. The Respondent agreed that as no funds stood to the credit of Mr E's account in the client's ledger as at 28<sup>th</sup> February 2001 there was a cash shortage on client bank account in an amount of £23,703.50 in respect of the unrecouped sum due to Legal Services Commission.

**Unallocated transfers from client to office bank account - £4,565.07 & personal payment from client bank account - £3,250.00**

24. During the period 26<sup>th</sup> June 2000 to 13<sup>th</sup> November 2000 client bank account was charged with 5 transfers to office bank account, varying in amount between £512.00.00 and £2,056.25 totalling £4,565.07. One transfer was to the Respondent's personal account at Barclays Bank in the sum of £3,250.00. The transfers were not allocated to any individual account in the clients' ledger but were merely debited to a suspense account numbered 4000.1.
25. On 21<sup>st</sup> March 2001, the day that the Investigation & Compliance Officer commenced his inspection, an office to client bank account transfer was made to correct the cash shortage.
26. In respect of the personal payment the Respondent indicated to the Investigation & Compliance Officer that she had authorised the same by telephone. Her instruction to the bank had been to transfer the funds from office bank account, and it was her usual practice to transfer funds from office bank account to her personal bank account in respect of drawings.
27. By letter dated 14<sup>th</sup> June 2001 the OSS wrote to the Respondent seeking her explanation. The Respondent replied by letter dated 27<sup>th</sup> June 2001. The Respondent accepted that in relation to the legal aid monies incorrectly retained in office bank account that was a situation which should never have happened. The Respondent said:-  
 "I should have paid much more attention to the Rules, the Legal Aid system and ultimately I should have supervised [Mr C's] files much more thoroughly".

In relation to the unallocated transfers the Respondent referred to problems she had had with Barclays Bank and accepted that on one occasion the bank transferred monies from client account rather than office account as she had requested. The Respondent accepted that she should have rectified the situation sooner than she did.

28. By letter dated the 23<sup>rd</sup> August 2001 the OSS wrote to the Respondent requesting confirmation as to whether she had received written confirmation from the Legal Services Commission that they would wait for recoupment on the 3 matters which were the subject of the FIU Report until they had paid McKay Beer Solicitors on the

other matters where monies were owed. Although a holding letter was sent on the 24<sup>th</sup> August 2001 on behalf of the Respondent, and the Respondent telephoned the OSS on the 30<sup>th</sup> August 2001, no further response was received and it was necessary for the OSS to write to the Respondent again by letter dated 4<sup>th</sup> October 2001. The Respondent replied by letter dated 5<sup>th</sup> October 2001 and provided the name of the lady at the Legal Services Commission with whom she had been dealing.

29. By letter dated 10<sup>th</sup> December 2001 the OSS wrote to the Respondent requesting documentary evidence showing rectification of the cash shortage. By letter dated 15<sup>th</sup> January 2002 the OSS wrote to Mr C seeking his explanation in respect of certain parts of the FIU Report.
30. By letter dated the 28<sup>th</sup> February 2002 Messrs Radcliffes Le Brasseur wrote to the OSS on behalf of the Respondent making further representations.
31. By letter dated 20<sup>th</sup> February 2002 Mr C responded and provided his explanation. By letter dated 15<sup>th</sup> April 2002 Radcliffes Le Brasseur provided further representations to the OSS on behalf of their client, in particular her comments in relation to the response of Mr C.
32. Further representations were made by Radcliffes Le Brasseur dated 20<sup>th</sup> May 2002. The matter was considered by the Adjudication Panel on the 22<sup>nd</sup> May 2002, who resolved to refer the conduct of the Respondent to the Tribunal. By letter dated 11<sup>th</sup> June 2002 Messrs Radcliffe Le Brasseur were notified on behalf of the Respondent of the decision.
33. Copies of all relevant correspondence were before the Tribunal.

#### **The Submissions of the Applicant**

34. The Respondent had admitted the allegations.
35. The Applicant did not allege dishonestly on the part of the Respondent but did put forward the breaches of the Accounts Rules as serious. The Tribunal was referred to the comments of Lord Bingham in the case of Weston in which it was said:-

“The Accounts Rules exists to afford the public maximum protection against the improper and unauthorised use of their money and that, because of the importance attached to affording this protection and assuring the public that such protection is afforded, an onerous obligation is placed on solicitors to ensure that the Accounts Rules are observed.

That is a duty which binds solicitors, quite apart from a duty to act honestly and in accordance with the duties of a trustee”.

36. There had been a part rectification by the Respondent of the cash shortage but she had not been in a position to make complete rectification.

37. In relation to the Legal Services Commission Funds incorrectly retained in office bank account, the Respondent had had the benefit of those monies by virtue of the fact that they were in her office account.
38. In relation to the matter of Mr E, whether or not the Respondent had instigated the transfers, she as signatory and sole principal should have checked and made enquiries before authorising them.
39. In relation to the personal payment from client bank account, whilst it was correct that on the day the inspection commenced an office to client bank account transfer was made to correct the cash shortage it was in the submission of the Applicant relevant that the Respondent had been aware of the transaction for several months but had failed to take action to rectify the same until the day of the inspection.
40. There had been a serious failure by the Respondent to comply with the Accounts Rules and to comply with the onerous obligation referred to by Lord Bingham.

#### **The Submissions on behalf of the Respondent**

41. The Tribunal was referred to the psychiatric and GP reports which were before it. The Respondent was unwell and unable to attend. The reports went to the state of mind and health of the Respondent now but were also relevant to the time when the Respondent was in practice and when the events which were now before the Tribunal occurred.
42. Counsel on behalf of the Respondent summarised her written statement, a copy of which was not before the Tribunal.
43. In her statement the Respondent said that she would like to have attended the Tribunal but felt unable to do so. She accepted responsibility for the allegations and spoke of the traumatic events of the last few years. She had suffered from depression and described the period as “a living hell”.
44. The Respondent had gained nothing personally. She had had to move home to a different area, which had affected her child. She had also entered into an Individual Voluntary Arrangement.
45. The Respondent did not intend to practise as a solicitor again indeed she suffered panic attacks when discussing practice.
46. The Respondent spoke of a personal bereavement she had suffered within days of the intervention.
47. The Respondent had told the Legal Services Commission that she would attempt to repay the shortage by recoupment.
48. The Respondent had suffered for what she had done wrong. She had never been a bad lawyer just a bad manager who could not deal with staff. She now wanted to rebuild her life for her family.

49. The Respondent accepted the seriousness of the breaches but asked the Tribunal to note that there was no allegation of dishonesty. The personal payment had been an error. From the time of the intervention the Respondent had been extremely co-operative and she was relieved that matters were finally being resolved.
50. The Respondent had admitted that the breaches arose in part because of a lack of supervision and she accepted that her duties were to supervise Mr C but felt let down by her colleague. Mr C had had conduct of many of the matters where incorrect transfers had been made.
51. The Respondent stressed however that she accepted responsibility. As a sole practitioner she had authorised the transfers. She had perhaps delegated where she should not have done.
52. In her letter to the OSS of 27<sup>th</sup> June 2001 the Respondent had written:-

“I admit allowing a situation to arise which should never have happened. I did not knowingly allow this to happen but take the responsibility...

I should have paid much more attention to the Rules, the legal aid system and ultimately I should have supervised [Mr C's] files much more thoroughly”.

53. Counsel on behalf of the Respondent said that the Respondent expressed her regret and remorse and acknowledged her shortcomings. She had a great sense of shame. Her personal health and family life had suffered. It was unlikely in the foreseeable future that she would practise again. The Tribunal was asked to consider that the ultimate sanction was not necessary in this case.
54. Costs were agreed.

#### **The Oral evidence of Mr Matthew Beer**

55. Mr Beer gave evidence in support of the Respondent whom he had met in 1995. He had practised in partnership with her from August 1995 until May 1996. The partnership had ended due largely to Mr Beer's ill health and to a lesser extent to a disagreement with the Respondent regarding the future of the practice in that Mr Beer had wanted to reduce a number of staff but the Respondent was very loyal to her staff and wanted to retain them.
56. The Respondent had previously been a partner in a large practice with a number of staff to support her. In Mr Beer's opinion the Respondent was a very fine lawyer but her managerial abilities had not been such that she could run a large practice herself.
57. In Mr Beer's experience the Respondent had relied on employing appropriate book-keeping staff and in practice had spent a considerable amount of money to this end but had had a woeful lack of support.

58. In Mr Beer's opinion the Respondent had been more concerned with the welfare of her staff than with taking hard decisions. She had protected them including Mr C.
59. The Respondent had had a good client base and had been highly respected dealing well with high profile cases. During their period of partnership there had been no complaint from any client about the Respondent.
60. The Respondent would have preferred to return to salaried employment but had felt beholden to her staff and to her cost she had continued as a sole practitioner.
61. In Mr Beer's view the Respondent was now totally traumatised and destroyed by this matter.

### **The Findings of the Tribunal**

62. The Tribunal found the allegations to have been substantiated indeed they were not contested. The Tribunal noted that there was no allegation of dishonesty against the Respondent and that she had admitted the allegations at an early stage. These were however failings with regard to the Accounts Rules at the most serious end of the scale. The Tribunal had noted the evidence in support of the Respondent by Mr Beer however the Tribunal had concerns regarding the Respondent's ability to practise should she decide to do so in the future given the serious nature of the allegations. The Tribunal however accepted the submissions of Counsel on behalf of the Respondent that this was not a case where it was necessary to impose the ultimate sanction. In the absence of any dishonesty on the part of the Respondent the Tribunal considered that the imposition of a period of an indefinite suspension was the appropriate penalty. The Tribunal therefore made the following order:-
63. The Tribunal order that the Respondent, Deborah Ann McKay of Candle Street, Rieking, Suffolk, solicitor, be suspended from practice as a solicitor for an indefinite period to commence on the 9<sup>th</sup> October 2003 and they further ordered that she do pay the costs of and incidental to this application and enquiry fixed in the sum of £8,000.00.

DATED this 25th day of November 2003  
on behalf of the Tribunal

S. N. Jones  
Chairman